UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

GOYA FOODS, INC.

and **Case No. 29-CA-29945**

DEWYS TAVERAS, An Individual

Ashok C. Bodke, Esq., Counsel for the General Counsel
Michael R. Cooper, Esq., *and Carlos G. Ortiz, Esq.*, Counsels for the Respondent

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York on April 27, 2010. The charge and the amended charge were filed on December 7, 2009 and January 27, 2010. The Complaint that was issued on February 23, 2010 alleged as follows:

1. That on or about November 29, 2009, the Respondent **(a)** directed Taveras to cease participating in a meeting of Local 888, United Food and Commercial Workers International Union and **(b)** ejected him from its Bethpage facility because he participated in that meeting.

2. That on or about December 11, 2009, the Respondent suspended Taveras for one week because he participated in the above described meeting.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. Jurisdiction

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is agreed and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

The Employer is engaged in the manufacture of foods and it operates a warehouse facility in Bethpage, New York. This facility has two shifts and the employees have been represented by Local 888, United Food and Commercial Workers International Union. At the time of these events, its contract with that union expired on October 31, 2009.

The Charging Party, Dewys Taveras, who used to be a member of the bargaining unit, was no longer in the unit because of a promotion he received to a non-bargaining unit position. Although classified by the employer as a Night Shift Assistant Foreman, the Employer does not contend that Taveras was a supervisor as defined by Section 2(11) of the Act. During the course of his employment, Taveras had accumulated 10 warnings from February 6, 2004 to September 20, 2008. The last indicated that it was a final warning and that similar violations could lead to disciplinary action up to termination.

The contract described above has a visitation clause which permits union representatives, on notice to the employer, to visit the facility and talk to employees. The bargaining unit consists of about 45 warehouse employees. Meetings are generally held in the Company's cafeteria.

On November 2, 2009, an employee named Juan Vargas filed a decertification petition in Case No. 29-RD-1138 seeking to oust Local 888 as the bargaining representative. Thereafter, on December 8, 2009, another union filed a petition in Case No. 29-RC-11863, seeking to represent the employees. (At that point the decertification petition was withdrawn). In any event, by late November 2009, there was a good deal of discussion about this situation within the shop and Local 888 was visiting the shop on a daily basis to promote its candidacy to be the bargaining representative.

Taveras arrived at the facility on November 29, 2009 before his starting time, (6:00 p.m.) and went to the cafeteria. At some point union representatives including Ricky Guzman, came into the cafeteria to talk to and hand out leaflets to the warehouse workers who were sitting around at the various tables. There then ensued an argument between Guzman and Juan Vargas, (the person who filed the decertification petition) about the value of Local 888's representation. At this point, Taveras raised his hand and asked if he could give his opinion. Although the shop steward, Hemildo Bonilla, opined that Taveras should not talk because he was not in the bargaining unit, Guzman said that he could. Taveras then proceeded to tell Guzman why some employees were upset with Local 888 and he seems to have made his point with enthusiasm and hand gesturing. In any event, there is no evidence that Guzman objected to Taveras' actions or statements or that he asked Taveras to leave the meeting.

During this transaction, foreman Stanley Cucalon entered the cafeteria to get some coffee. He noticed the interaction between Guzman and Taveras and told Taveras that he should not get involved because he did not belong in the Union. Taveras said that he was on his own time and that he had every right to stay.

Shortly thereafter, Edwin Salazano, the Night Shift Manager walked by the cafeteria and testified that he saw Taveras gesticulating toward Guzman and speaking loudly, albeit he couldn't hear what was said because the door was closed. Salazano testified that he entered the room and because he was fairly far away from the others, he called out to Taveras that he should leave the cafeteria. Taveras refused and when Salazano again told him to go outside Taveras replied: "come and take me out." Both Salazano and Taveras were talking loudly because they were about 40 feet away from each other.

This transaction was reported to John Quinones, the General Manager and after investigating the matter, he recommended to the Company's Human Resources Department that Taveras be fired because of his actions in the cafeteria, which he considered to constitute insubordination and because of Taveras' past disciplinary record. Notwithstanding this recommendation, Tony Rico, the Director for Human Resources decided that the people got

carried away by their emotions and that Taveras should not be fired. Instead, Taveras was given a five day suspension.

Analysis

Taveras was not in the bargaining unit and therefore was not represented by the Union. Nevertheless, Taveras sought to express his opinion at a union meeting held on November 29, 2009 regarding a pending decertification petition that was being held in the Employer's cafeteria pursuant to company's approval. This meeting was held on non work time and Taveras happened to be in the cafeteria before his shift was to start. Although the union representative addressing this meeting might have had his own reason to ask Taveras, a non-member, to either leave or abstain from participating in the meeting, he did not do so. Instead, the evidence indicates that Ricky Guzman specifically agreed to listen to Taveras' comments and opinions regarding why some employees were dissatisfied with their union representation. In any event, Guzman did not ask Taveras to leave and did not ask anyone from the Company to direct Guzman to leave. In my opinion, it was not within the Company's prerogative to decide who could or could not attend a union meeting that was legitimately being conducted, pursuant to the collective bargaining agreement's visitation clause, on the Company's premises during non-working time. I therefore conclude that the Respondent violated Section 8(a)(1) of the Act by directing him to leave the union meeting and ordering him off the premises.

Because Taveras was participating in a union meeting and was involved in discussing, with other employees, the merits or demerits of union representation, it is my opinion that he was engaged in union and concerted activity as defined in Section 7 of the Act. The fact that he was not in the bargaining unit, has no relevance.

In my opinion, since Taveras was engaging in union and concerted activity when he was expressing his opinion at a union meeting, the Employer had no independent right to order him to leave the Union's meeting unless it can demonstrate that his conduct was sufficiently egregious to remove his actions from the protection of Section 7 of the Act.

In *Atlantic Steel*, 245 NLRB 814 (1979), the Board established standards by which to decide whether concerted activity would be protected or unprotected, depending on the manner and means by which the conduct was carried out. The Board required the balancing of four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an Employer's unfair labor practice.

In substance, the Respondent's evidence is that two supervisors who passed by the cafeteria and who saw parts of the meeting, noticed Taveras speaking in an excited manner to union representative Guzman in the presence of other employees. They admit that they could not hear what was he said and that they were not asked by Guzman to have Taveras removed from the meeting. When Salazano told Taveras to go outside Taveras replied: "come and take me out." At that time, both Salazano and Taveras were talking fairly loudly because they were about 40 feet away from each other. To the extent that the Respondent claims that this statement by Taveras should be construed as a challenge to fight, I think that this is a stretch and I do not agree with that conclusion based on the words used or the context of the event.

In my opinion the Respondent's reliance on cases such as *Eagle-Picher Industries*, 331 NLRB 169, (2000) and *Carrier Corp*., 331 NLRB 126 (2000), is inapposite. In *Eagle-Picher*, the Employer held a series of captive audience speeches before an election and asked that all questions be held to the end. Notwithstanding that instruction, an employee continually

interrupted the employer's presentation and refused to sit down and be quiet. When the speaker continued, the employee opined, in effect, that the presentation was "garbage."

Although the Respondent asserts that the factual situation in *Eagle-Pitcher* is analytically identical to the facts in the present case, I do not agree. In *Eagle-Picher*, the employees were not really engaged in concerted activity when they were compelled to attend a meeting and listen to the employer's speech as to why they would be better off without union representation. The function of that meeting was not to have employees engage in concerted activity for their mutual aid and protection; the function was to have them be an audience to the employer's position on union representation. In *Eagle-Picher* one can say that since an employer, during an election campaign, has a right under Section 8(c) of the Act to express his opinion about union representation, he also has the right to discipline employees who actively, aggressively and by their conduct preclude or significantly interfere with that right. [1]

In the present case, the evidence simply does not show that Taveras, by his conduct during the November 29 union meeting, was engaged in conduct that interfered with the Union's right to present its opinion about union representation to the assembled employees. Union representative Guzman did not object to Taveras' presence or conduct. And at no time did union representatives assert or indicate that Taveras should have left the meeting or otherwise have ceased his conduct during the meeting.

In my opinion, Taveras' conduct during the November 29 meeting did not, under the criteria of *Atlantic Steel,* lose the protection of Section 7 of the Act. See *Media General Operations, Inc. d/b/a The Tampa Tribune*; 351 NLRB 1324, 1335-1326 (2007); *Noble Metal Processing, Inc*. 346 NLRB 795 (2006); *Aluminum Co. of America*, 338 NLRB 21 (2002). Cf. *Starbucks Corp.*, 354 NLRB No. 99 at footnote 5 (2009). In my opinion, his conduct was protected and therefore the Employer's decision to suspend him for that conduct violated Section 8(a)(1) and (3) of the Act.

Conclusions of Law

By suspending Dewys Taveras because he participated in a meeting with Local 888, United Food and Commercial Workers International Union, the Respondent has violated Section 8(a) (1) & (3) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[1] In my opinion, *Carrier* is factually distinguishable as well. In that case, the alleged discriminatee, along with another employee essentially barged into a business meeting being conducted by a manager and insisted on raising a completely separate issue than what was being discussed in the meeting. The Manager asked the two employees to leave and one left to return to work while the alleged discriminatee stayed on to argue his point in what the ALJ concluded was a threatening manner. At footnote 1, the Board stated: "we find it unnecessary to rely on the judge's finding that Gresham's conduct on April 3, 1996 was not concerted activity. Instead we rely solely on the judge's findings that the Respondent lawfully disciplined Gresham based on his interruption of a meeting conducted by Manager Kathy Holen with other employees; Gersham's insistence on discussing immediately a subject unrelated to the meeting and his failure and refusal to acquiesce in Holen's repeated directions to him that his concerns could be discussed later that day at a more appropriate time."

In view of the above, I shall recommend that the Respondent, having discriminatorily suspended an employee, it must make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the dates of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (2987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [2]

ORDER

The Respondent, Goya Foods, Inc., its officers, agents, and representatives, shall

1. Cease and Desist from

(a) Directing employees not to participate in union meetings or ejecting them from its premises because they attend union meetings.

(b) Suspending employees because they participate in union meetings.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole, with interest in the manner described in the Remedy Section of this Decision, Dewys Taveras for any loss of income he may have suffered by reason of his discriminatory suspension.

(b) Within 14 days after service by the Region, post at its facilities in Bethpage, New York, copies of the attached notice marked "Appendix " [3] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since November 29, 2009.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., June 15, 2010.

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Raymond P. Green
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT direct our employees not to participate in union meetings or eject them from our premises because they attend union meetings.

WE WILL NOT suspend employees because they participate in union meetings.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole, with interest, Dewys Taveras for any loss of earnings that he may have suffered as a result of the discrimination against him.

Goya Foods, Inc.
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.